**Editor's note: Appealed -- dismissed, sub nom. Century Industries - Flagstaff v. Morton, Civ.No. 75-157 (D.Ariz. Apr. 23, 1979)**

UNITED STATES
v.
URBAN HARENBERG ET AL.

IBLA 72-78 Decided June 14, 1973

Appeal from the decision of Administrative Law Judge 1/ Dent D. Dalby holding that the Lava placer mining claim is null and void.

Affirmed.

Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

> Mining claims located for material which is principally valuable as common fill to bring low ground up to grade or to serve as base material for roads, airport runways, building foundations, and the like, have never been valid under the mining law, and evidence of profitable sales for such purposes can not validate such a claim.

Mining Claims: Common Varieties of Minerals: Generally

> A deposit of volcanic cinders which are only suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarily used.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

> In a contest of the validity of a mining claim, located for a common variety of mineral prior to July 23, 1955, the absence of any development of the claim or any sales of the minerals for legitimate purposes may raise a presumption that the value of the minerals was not then sufficient to justify the cost of their extraction, processing and delivery in competition with

---

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission and implemented by amendment of Subtitle A, Title 43, Code of Federal Regualtions, 38 F.R. 10939 (May 3, 1973).

other available supplies, and the failure of the contestee to rebut such a presumption by credible evidence showing that the materials could have been extracted and marketed at a profit will support a holding that the claim is invalid.

APPEARANCES: Urban Harenberg, pro se; Richard L. Fowler, Esq.; Office of the General Counsel, Department of Agriculture, for the appellee.

OPINION BY MR. STUEBING

Urban Harenberg, LaVaun Harenberg, Sylvan Harenberg and Beth Harenberg, owners of a one-half interest in the Lava placer mining claim, have appealed from the August 13, 1971, decision of the Administrative Law Judge, whereby the Lava placer mining claim was held to be null and void. 2/

The claim is situated in the Coconino National Forest, about five miles from the city of Flagstaff, Arizona. The claim was located for cinders in 1952 by an association of eight locators, and embraces an area of 160 acres. Contest proceedings were initiated by the Department of the Interior at the request of the Forest Service. The complaint charged that (1) the claim contains acreage in excess of that allowed under the mining laws of the United States; (2) a valid mineral discovery as required by the mining laws of the United States does not exist within the limits of the claim; and (3) the land embraced within the claim is nonmineral in character.

As to the first charge, the Judge held that there was no evidence of any irregularity in the association of the eight individual locators, as alleged by the contestant, and that they were therefore permitted by law to locate a single association placer claim of 160 acres. This was, in effect, a holding that there was a failure of proof by the contestant relating to this charge.

Regarding the charge that a discovery does not exist within the limits of the claim, the Judge found first that the cinders were a common variety mineral within the purview of the Act of July 23, 1955, 30 U.S.C. §§ 601 et seq. (1970), citing the standards

---

2/ The other original locators were Patrick Hargrove, Frances R. Hargrove, Martin Jensen and Pearl Jensen. In 1955 Patrick and Frances Hargrove quitclaimed their interest to Martin Jensen. The Jensens then sold their interest to J. R. Porter, which consolidated a one-half interest in the claim in Porter. In 1965 Porter sold this interest to the Flagstaff Services and Materials Co., one of the contestees in this action. That company was engaged in a bankruptcy proceeding and did not appear at the hearing, nor did it appeal the Judge's decision.

established in United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968), and summarized in McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1968). Accordingly, he concluded that the claim must have been perfected in all of its aspects on that date in order to be sustained thereafter, citing United States v. Coleman, A-28557 (March 27, 1962), aff'd in United States v. Coleman, 390 U.S. 599 (1969); Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968); United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

The Judge noted that although the evidence showed that the claim was opened and developed in the early 1950's and substantial quantities of overburden and cinders were removed over a period of years thereafter, the material was used only for fill, and common-place material used for fill has never been locatable under the mining law, citing Holman v. State of Utah, 41 L.D. 314 (1912); Gray Trust Co. (On Rehearing), 47 L.D. 18 (1919); United States v. George W. Black, 64 I.D. 93 (1957); United States v. William M. Hinde, A-30634 (July 9, 1968). He found that the cinders were used for the manufacture of cinder blocks for a few days in 1958 or 1959 and for almost a year in 1966, and for a short period in 1969, but he held that a profitable use for this purpose in 1966 failed to establish that cinders from this deposit constituted a valuable deposit in 1955 when common varieties were withdrawn from mineral entry, and he concluded that a discovery of a valuable mineral deposit as of July 23, 1955, had not been demonstrated. On that basis he ruled that the claim is null and void.

The Judge did not make any determination regarding the charge that the land is nonmineral in character.

The salient facts, as indicated by the evidence, are as follows. Urban Harenberg is the founder and president of Harenberg Block Co., Inc., of Flagstaff, Arizona, which manufactures construction block of various kinds using volcanic cinders as the principal material. The business commenced operations in 1947. Cinders were obtained from several sources on private, state and federal lands through purchase, lease and claim. Urban Harenberg was a co-locator of several cinder claims prior to July 23, 1955. His only apparent purpose was to secure sources of supply for the manufacture of block. Some deposits of cinders are better suited to the manufacture of block than are others, and some deposits are wholly unsuited for this purpose. Because of this, Harenberg asserts that cinders which can be used for block manufacture are not a common variety within the context of the Act of July 23, 1955, supra. We cannot agree.

In resolving this appeal we must take official notice of a decision recently issued by this Board in the case of another mining claim located for cinders in the same area by Urban Harenberg and his associates, that claim being the Harenberg No. 1 placer mining claim. United States v. Urban Harenberg, 9 IBLA 77 (1973).

> In that case, hereinafter referred to as the first Harenberg, we held:
> A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarily used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Having concluded that such cinders are a common variety, we now take up the question of whether there was a discovery within the limits of the Lava claim prior to July 23, 1955. The evidence is sufficient to establish to our satisfaction that there was a physical exposure of cinders within the limits of the claim prior to that date. However, the mere uncovering of the deposit is not enough to constitute a qualifying discovery. It must also be established that the deposit is "valuable" within the meaning of the mining law. 30 U.S.C. § 22 (1970). The value of the deposit is tested by economic standards; i.e., whether, prior to July 23, 1955, the material could have been mined, removed and marketed at a profit. See citations, supra.

As indicated in the Judge's decision, the evidence shows that substantial quantities of material were removed and marketed at a profit from the Lava claim prior to July 23, 1955, and subsequently, by certain of Harenberg's co-locators, and their successors. However, all this material was disposed of as common fill to bring low ground up to grade or to serve as base material for roads, airport runways, building foundations, and the like. The Judge correctly held that because the mining law has never countenanced the location of claims for fill material, the profitable sales of materials from the claim for that purpose could not validate the claim in this instance. See citations, supra.

In a contest of the validity of a mining claim located for a common variety of material prior to July 23, 1955, the absence of any development of the claim or any sales of the minerals for legitimate purposes may raise a presumption that the market value of the

minerals was not then sufficient to justify the cost of their extraction, processing and delivery in competition with other available supplies. However, this presumption may be overcome by credible evidence showing that the materials could have been extracted, removed and marketed at a profit. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968); Multiple Use, Inc. v. Morton, Civ. No. 71-211 PCT-WCF (D. Ariz. Nov. 9, 1972).

The first use of the cinders from the Lava claim which was related to the manufacture of block apparently occurred in 1958 or 1959 when Harenberg used material from the Lava claim for several days during a period when the company's regular supplier, Paul Zanzucci, was closed down. When Zanzucci resumed sales, the Harenberg Block Company discontinued using cinders from the Lava claim. The company next used cinders from the Lava claim for block manufacture for a period of about a year beginning in 1965 or 1966. Again the company returned to its other sources. When business disagreements and material depletions forced the company to discontinue receiving material from the Zanzucci pit and the Forehand pit, it again went back to utilizing material from the Lava claim. That was just for a short period in 1969, and was the last such use. Again the company discontinued using cinders from the Lava claim in favor of yet another source leased from the State and known as Turkey Hill.

This history indicates a disinclination on the part of the company to utilize cinders from the Lava claim while other sources are available. There are two possible explanations for this reluctance to use Lava cinders; either those cinders were being held as a reserve of good quality material, or else the quality was so inferior that the company would not utilize them unless circumstances made their use unavoidable. The answer is suggested by Urban Harenberg's testimony regarding the Lava claim in the first Harenberg, supra, at page 79:

> Harenberg also uses some cinders from another source called the Lava claim located in 1952 [Tr. 52], "but that is not as good a cinder." [Tr. 77).

Other evidence militates against a conclusion that cinders from the Lava claim were being withheld as a reserve of good quality. Pits were opened as early as 1952 by Harenberg's co-locators who removed the overburden and exposed banks of what Harenberg describes as good cinders. These people and their successors, who owned the outstanding half-interest not held by appellants, were steadily depleting the supply. As noted in the decision below, B. B. Bonner reported removing 10,000 cubic yards, Martin Jensen took 3,500 yards,

J. R. Porter, president of Flagstaff Materials Company, the other named contestee, reported taking about 2,700 yards. The City and County also took large amounts from the claim until prevented by Harenberg. Harenberg and the other appellants received no share of the profits resulting from any of these removals. Moreover, the claim is situated only five miles from Flagstaff, where the Harenberg Block Company plant is located. Access to the claim is good.

Under these circumstances it is hard to accept Harenberg's contention that these were high quality cinders which he was holding in reserve, but which he could have used profitably in 1955. On the contrary, the evidence is that they were so inferior for Harenberg's purpose that they were treated as a cinder of last resort, to be used only when there was nothing better available. Therefore, the Lava claim cinders can not be regarded as economically competitive with the other sources which existed on July 23, 1955.

Finally, we note that in the first Harenberg, supra, we approved for patent 40 acres of the Harenberg No. 1 claim as a reasonable reserve supply. Even were we to reach an opposite conclusion with respect to the value of the deposit on the Lava claim, we would then have to consider the issue of excess reserves. However, in light of our holding this will not be necessary.

We conclude that appellants have failed to demonstrate the discovery of a valuable mineral deposit on or before July 23, 1955.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Edward W. Stuebing, Member

We concur:

_____
Martin Ritvo, Member (Concurring separately)

_____
Frederick Fishman, Member

Concurring opinion by Mr. Ritvo.

I concur in the result reached in the majority opinion but for a different reason.

The majority holds that the deposit of cinders on the Lava claim cannot be regarded as economically competitive with other sources available on July 23, 1955, because it is not of as good quality as the others. In my opinion the evidence demonstrates that cinders on the Lava claim are as of good quality as the other cinders being used by Harenberg. Harenberg stated that the cinders on the Lava were tested at the University of Utah, along with material from the Zanzucci pit (apparently in the same rim cone or formation and which he used as his source for many years), and he was told, "You'll never find anything better. You have got the best, as good as anything we have ever investigated" (Tr. 41). Later he repeated that the Lava cinders were just as good as the material in the Zanzucci pit (Tr. 46), that "* * * it is the same type of cinders, generally * * *" (Tr. 51), and that "they were identical to what we were getting from the Zanzucci pit * * *" (Tr. 56). I think their quality is also shown by the fact that in times of shortage Harenberg turned to the Lava claim rather than to others available. In fact, he used the Lava claim for about a year in the mid-1960's, a period lengthy enough to dispel any notion that the cinder is of lesser quality (Tr. 58). It is noteworthy that he did not exploit the Harenberg No. 1 claim, held valid by this Board in United States v. Harenberg, 9 IBLA 77 (1973). I also note that the Administrative Law Judge had no doubts as to the quality of the Lava cinders; to the contray, he referred to them as being of "high quality."

I would hold the claim invalid, as the Judge did, on the ground that Harenberg failed to show that he had made a discovery of a common variety of cinders on the claim as of July 23, 1955, by demonstrating that the cinders could have been extracted, removed and marketed at a profit from the claim as of that date.

This test is the one used in many Departmental decisions and affirmed by the courts, e.g. United States v. Charleston Stone Products, Inc., 9 IBLA 95 (1973), United States v. Osborne, 77 I.D. 83 (1970), aff'd Osborne v. Morton, D. Nev. Civil No. 564, March 1, 1972), for determining the validity of mining claims located for a common variety of sand, stone, gravel, pumice, pumicite, or cinders.

At most, the evidence establishes that in 1955 Harenberg was the operator of a business making cement block from cinders, the cinders he used were a common variety, he operated from leased deposits most of the time (Tr. 46, 47, 60), and he had located

this and other claims in the vicinity and had others under lease (Tr. 58, 59, 60). Harenberg also testified that he needed several colors of cinder in his operation (Tr. 47, 50).

In other words, Harenberg is in exactly the same position as many other locators of mining claims based on a common variety mineral. He located claims for a common variety mineral in an area which there was a market for that material but in which the total supply far exceeded the demand as of July 23, 1955, (and after), and he sold or used in his business similar deposits from other claims or sites, but not from the one at issue. As I have said, claims whose validity is based on such evidence have uniformly been held invalid on the ground that this type of evidence is too hypothetical and theoretical to overcome the government's prima facie case of lack of discovery. United States v. Charleston Stone Products, Inc., supra, United States v. The Dredge Corporation, 7 IBLA 136 (1972); United States v. Clark County Gravel Rock and Concrete Company, A-31025 (March 27, 1970).

In replying to a similar argument, the Board held in Charleston Stone Products, supra, where one sand gravel claim was held valid, but others, including an abutting claim, were held invalid:

> "The contestee strenuously contends that the Judge erred when he held that a showing of marketability of the sand and gravel deposit on each claim was required to validate that claim. It cites the decision rendered in United States v. Alfred N. Verrue, 75. I.D. 300, 306 (1968):
>
> > * * * [I]t must be shown * * * that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit.

From this it argues that proof of marketability on any one claim should be sufficient to establish marketability on all claims which embrace the same deposit.

> Suffice it to say that such is not the law as consistently applied by this Department. There must be evidence as to the marketability of each of the claims. See e.g., United States v. Henrietta Bunkowski and Andrew Julius Bunkowski, 5 IBLA 102, 120, 79. I.D. 43, 51-52 (1972), "The appellants must show as to each claim that they have found a mineral deposit which satisfies the prudent man rule . . ." (emphasis in original): United States v. Frank and Juanita Melluzzo,

76 I.D. 181, 189 (1969), "The appellants must show as to each claim that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on that claim" (emphasis in original) See also Osborne v. Hammitt, Civil No. 414 U.S.D.C.D. Nev. August 19, 1964.

Contestee's argument applied to the location of common varieties of sand and gravel, would prove too much. Under its auspices a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location. The fact that contestee's location followed the bed of a wash and that it has not attempted to embrace an entire alluvial fan would not limit the scope of the rule it seeks to have implemented.

Its argument that the effect of such a holding is to require competition with itself has been pressed before. See United States v. Fisher Contracting Company, A-28779 (August 21, 1962). There, as here, the contestee has misunderstood the thrust of the requirement. It is not required that the claimant produce from each claim, but that it show marketability from each claim. Production is not a prerequisite for a finding of marketability. See United States v. Howard S. McKenzie, 4 IBLA 97 (1971). The Department, however, has recognized the difficulty of proving marketability without showing any sales, pointing out in numerous cases, that while the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299, 306 (1969), and cases cited.

Testimony that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims is insufficient to satisfy the present marketability test; the claimants must show the existence of an actual demand for material from specific claims as of July 23, 1955. See United States v. William A. McCall, Sr., et al., 2 IBLA 64, 78 I.D. (1971).

* * *

The government also argues that the Judge erroneously validated Claim No. 9 as a source of reserve material.

Two points are salient on this issue. The Judge had already found that 5,000 cubic yards of material were mined annually from Claim No. 10, with some overlap into Claim No. 9. It is stated in the record that the estimated reserves on Claims Nos. 9 and 10 are in excess of 1,000,000 cubic yards of useable material. At the rate of removal occurring in 1955, the Judge's decision provides as a reserve a 200-year supply. This is far in excess of the reserve normally granted, see United States v. Robert E. Anderson, Jr., 74 I.D. 292 (1967). Even utilizing the Judge's stated rational it is difficult to see how Claim No. 9 could be validated as a source of reserves.

A more basic problem is, as was pointed out by the Government, the Judge's misunderstanding of 43 CFR 3711.1(b), as it relates to reasonable reserves. A claim is not validated as a reasonable reserve; rather, the presence or absence of a reasonable reserve within the claim is looked to in determining the present marketability thereof. See United States v. William A. McCall and R. V. Kaltenborn, 1 IBLA 115, 122 (1970). There must be independent evidence of the present marketability of a claim held as a reserve in order to validate that claim. United States v. Neil Stewart, 5 IBLA 39, 55 (1972). Thus, Claim No. 9 must rest upon its own factual situation and the Judge's validation of it "as a source of reserve material" must be set aside. If it is to be validated, it must have independent marketability. For reasons elaborated, infra, we believe that it does not and therefore to this extent the Judge's decision must be reversed.

For the same reasons I would hold this claim invalid. 1/

---

1/ While United States v. Harenberg, 9 IBLA 77 (1973) did not analyze the issues in this context, it is, in my view, indistinguishable from this case and from Charleston Stone Products and Dredge Corporation, supra, and therefore ought not to be followed.